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TABLE OF AUTHORITIES CITED

No. 1178

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED STATES, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE STATE OF ARIZONA AND THE ARIZONA INTERSTATE STREAM COMMISSION AS AMICI CURIAE

The State of Arizona, sponsored by its Attorney General, and the Arizona Interstate Stream Commission, an agency of the State of Arizona organized and existing under and by virtue of Title 45, Chapter 2, Article 2, Arizona Revised Statutes, sponsored by its authorized law officer, present this brief as amici curiae under Rule 42(4) of the Rules of this Court.

QUESTIONS PRESENTED[1]

1. Whether Congress in enacting the McCarran Amendment (43 U.S.C. § 666) intended to allow the United States, in cases in which it asserts water claims under the reserved rights doctrine, to rely upon its soverign immunity defense and thereby not only prevent any determination as to whether such claims by the United States are valid or invalid but also prevent any effective determination of any water rights along the water source at issue.

2. Whether the McCarran Amendment authorized suits against the United States to determine the water rights on identifiable streams or rivers which are tributaries of other rivers, or whether the waiver applies only to an adjudication of rights in a river which is not a tributary of any other river.

INTEREST OF THE STATE OF ARIZONA AND THE ARIZONA INTERSTATE STREAM COMMISSION

By statute, the Arizona Interstate Stream Commission is charged with prosecuting and defending "all rights, claims and privileges of the State [of Arizona] respecting interstate streams." ARS § 45-506 B 1. Many of the interstate streams in Arizona traverse lands withdrawn by the federal government. The issues posed by the instant case are of central importance to the proper discharge of the Arizona Interstate Stream Commission's statutory duty. As will be developed more fully in the body of the brief, it is impossible to determine either the rights of the State of Arizona, or the rights of any other claimant on a given stream or water source unless the rights of all claimants in that source are determined as part of the same adjudication. This problem exists irrespective of whether the federal claims are founded on state or federal law. Therefore, if the United States is allowed to rely upon

[1] In our view, the issue treated under Section II of the Government's brief is not properly before the Court because the Colorado Supreme Court has not finally ruled upon it. In any event, the issue involves solely matters arising out of the Colorado Constitution and Enabling Act, and will not be treated by this brief.

its sovereign immunity defense, the United States will not only prevent adjudication of the validity of its own water claims, but also all other claims to the same source, including those of the State of Arizona.

ARGUMENT

I.

The basic dilemma which the McCarran Amendment[2] was intended to resolve is well-known. In the usual case the water rights of any individual claimant cannot be determined in isolation from the rights of other claimants along the same stream or other water source. A judicial determination that any one individual is entitled to a water right in a given source is of small significance, even to the claimant, unless there has also been a determination concerning the validity of other claims to the same source, including relative priorities, and quantities to which each claimant is entitled. As the Ninth Circuit Court of Appeals has observed:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California v. United States*, 235 F.2d 647, 663 (9th Cir. 1956).

Prior to the McCarran Amendment, claims by the United States to the waters of any stream or water source posed the following dilemma: (1) The rights of any claimant could not be effectively adjudicated without joining all claimants, including the United States, but (2) The United States, unlike individual claimants, could prevent its own joinder as a defendant because of its sovereign immunity.

Therefore, the mere existence of a United States water claim—not right, but claim—in a river system or other source effectively

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[2] Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666, commonly referred to as the "McCarran Amendment," because it was enacted as a rider to the Appropriations Act for the Justice Department.

precluded not only the determination of the validity of that claim, but also the determination of all water rights in the entire river system.

The purpose of the McCarran Amendment was to eradicate this dilemma. At the time that the bill was pending before Congress, some fear was expressed that it might be used as a weapon to impede the development of United States reclamation projects. In a letter to Senator Magnuson, Senator McCarran stated the purpose of his amendment, and clarified that it was not to be used by individual litigants on a single-shot basis to impede reclamation projects. Senator McCarran wrote (98 Cong. Rec. 123 (1952)):

> "You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.
>
> S. 18 is not intended to be used . . . for any other purpose than *to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.*" (Emphasis added.)

The Ninth Circuit Court of Appeals stated the purpose of the McCarran Amendment as follows:

> "There can be little doubt as to the kind of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters on the stream system; rather, it was the quasi-public proceeding in which the law of western waters is known as a 'general adjudication' of the stream system: one in which the rights of all claimants on the stream system, as between themselves, are ascertained and officially stated." *State v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961).

The debilitating limitation which the Government in the instant case is attempting to engraft on the McCarran Amendment is at odds with the statutory language, and would reinstate—in cases involving United States water claims under the reservation

theory—they very dilemma which Congress thought that it had eliminated when it passed the McCarran amendment. The sovereign immunity of the United States is just as much a bar not only to determination of claims of the United States, but also to effective determination of other water claims when the United States claims rest upon alleged reserved rights as when they are founded on any other basis.

It is true, as the Government states, that the reservation doctrine differs in some respects from the doctrine of appropriation. But it does not follow—as the Government appears to assume—that the mere fact that there has been a reservation of federal lands precludes the existence of any questions with regard to the quantities of water which were reserved for use in connection with the reserved lands or the priorities established thereby vis-a-vis other lands. Taking at face value the Government's statement concerning the extent to which rights are acquired under the reservation theory, it is readily apparent that adjudication of water rights on a river or other water source cannot be accomplished unless the reserved rights of the United States are also adjudicated. The Government states that:

> "Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fufill the purposes for which the lands were withdrawn, subject only to water rights vested as of that date." Brief for the United States, p. 9.

Accepting this characterization as correct, it immediately appears that lack of jurisdiction over the United States in a general adjudication of a stream along which the United States claims water rights under the reservation theory would preclude the effective determination of relative rights in that stream. No such adjudication would be possible unless the following questions, for example, were resolved:

1. What was the date of withdrawal?

2. As of the date of withdrawal, what were the "existing vested water rights"?

3. What were "the purposes for which the lands were withdrawn"? Is the water being used for these purposes or for other purposes, which have come into existence since the date of withdrawal?

4. How much water is "necessary to fulfill the purposes for which the lands were withdrawn"?

5. What portion of the withdrawn lands is served by the water source at issue and what portion is served by some other source? What portion of the total water requirements for the reserved lands will the litigated water source have to bear?

The statement in the Government's brief that the Colorado Supreme Court decision in this case "effectively dispos[es] of valuable property rights of the United States" (Brief for the United States, p. 18) is flatly erroneous. The effect of the Colorado Supreme Court's decision is not to deprive the United States of legitimate water rights that it has, but simply to permit the determination of whether in fact, such water rights exist. The "disposing of valuable property rights" will occur not if the lower Court's decision is affirmed, but if the Government's position prevails on this appeal, because what the Government is really asking in this case is not protection from deprivation of its rights, but insulation from the possibility of a determination as to whether it has any rights.

Reversal of the lower Court on the grounds urged by the Government will effectively place the Government in a position where the mere assertion of a water right under the reservation theory will be tantamount to the existence of such a right, because of the Government's ability to hide behind the sovereign immunity shield.

In its Petition for Certiorari, the Government complained that "if allowed to stand, the decision below will expose the United States to hazards of litigation regarding its water rights . . . ." Petition for Certiorari, p. 12. The only "hazard of litigation" which the Colorado Supreme Court decision poses to the United States is that there will be a judicial determination whether claim-

ed water rights can or cannot be supported, and whether they are or are not prior to other claimed rights.

Whatever differences may exist between the reservation doctrine and the appropriation doctrine are not really material to this case. The point of central significance under each doctrine is the establishment of rights as of a given point in time. Taking the Government's definition, the time priority in the case of reserved rights is established as of the date of withdrawal. In order to have an effective adjudication, that withdrawal date, and the rights established thereby, must be fitted into the total hierachy of water rights which it is the function of the courts to establish.

Another consistent theme running through the Government's argument is that state courts will be unfair to the United States in this kind of litigation. Aside from the fact that assuming a universal bias in state courts against federal water rights is not a proper basis for such an argument, the argument itself is inapt. Even assuming the existence of such a bias, the United States could never be deprived of its rightful water rights. So long as this Court sits there exists a tribunal which can correct any water rights judgment entered as a result of bias against the United States.

Congress could hardly have been more explicit in clarifying its intent to waive the sovereign immunity of the United States in all cases involving an adjudication of water rights or for the administration of water rights of a river system or other source. The waiver of immunity applies "where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666. The scope of the waiver must be determined by analyzing the four prepositional phrases which follow, and modify, the pivotal term "water right." These four prepositional phrases describe the four types of water rights to which the waiver of immunity is intended to apply. The four categories are:

1. "by appropriation under State law,"
2. "by purchase,"
3. "by exchange,"
4. "or otherwise . . . ."

We submit that Congress, by adding the all-inclusive phrase "or otherwise" at the end of its list of types of federal claims to which the immunity waiver applies, intended to make its waiver effective as to all types of federal claims. This interpretation is also the only interpretation which is consistent with the underlying purpose of the entire section.

Upon analysis, the rule of ejusdem generis does not support the Government's position. The first three of the four prepositional phrases obviously refer to specific means whereby the United States may acquire water rights. The United States, just like any other appropriator, may appropriate according to state law. Similarly, the United States may purchase land, or engage in a land exchange, and thereby acquire water rights. The Government's ejusdem generis argument apparently rests on the proposition that the phrase "under State law" implicitly modifies not only "appropriation," but also "purchase," "exchange," and "or otherwise." In this the Government fails both on its grammar and also on its law. Grammatically, if Congress had intended to limit all four types of the described water rights to those which are governed by State law, it would have said so, by limiting § 666 to those cases "where it appears the United States is the owner of or is in the process of acquiring water rights *under State law* by appropriation, by purchase, by exchange or otherwise. . . ." Congress did not do so. Under § 666, as it was passed by Congress, the "under State law" limitation applies only to water rights acquired by appropriation.

Selected excerpts from the legislative history of Section 666 refer to rights obtained under State law; however, there is nothing in the legislative history which indicates that the statute dealt only with rights acquired under State law. Indeed there are por-

tions of the history which demonstrate that Congress was dealing with all situations in which the Government's immunity precluded a determination of water rights on a stream, such as the statement by Senator McCarran that the purpose of the Act was "to allow the United States to be joined in a suit wherein it is necessary to adjudicate *all of the rights* of the various owners on a given stream." 98 Cong. Rec. 123 (1952) (Emphasis added).

In a letter stating the views of the Interior Department on Senate Bill 18 — whose provisions were in all material respects the same as those of the McCarran Amendment as finally enacted — Mr. Mastin G. White, acting Assistant Secretary, recommended that the bill not be enacted. Mr. White proposed that the waiver of immunity should be limited in several respects, among them:

> "The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years). . . ." 98 Cong. Rec. 123 (1952)

Thus, the Interior Department viewed Senate Bill 18 as waiving the immunity of the United States in cases involving all types of federal claims, and specifically requested that the waiver be limited to "an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law. . . ." Congress did not accede to this governmental request to change the scope of the statute. Having failed to persuade Congress to change the statute, the Government is now attempting to have this Court change it.

The irony of the Government's position—and its incompatibility with the basic purpose of the McCarran Amendment—is illustrated by the Government's concession that in given cases the United States might "[list] and [seek] recognition, in adjudication proceedings to which it is otherwise properly a party, of its existing and estimated future requirements for water claimed

under the reserved rights doctrine in the area involved." Brief for the United States, p. 19. Thus, in some cases the Government is apparently willing to inform the courts concerning the amount of water that it needs, but not to have the courts determine whether it is entitled to such water. If the Government is so confident of its water rights under the reservation doctrine, why does it object so strenuously to a determination of the existence and extent of those rights?

With all due respect, it is not becoming to the sovereign to hide behind an ancient and outworn doctrine which makes it immune from suit, agreeing to do nothing more than inform courts adjudicating the water rights of its neighbors as to the amounts of water which it claims, without permitting those courts to determine the validity of such claims. It was precisely this type of misuse of sovereign immunity which led to the enactment of the McCarran Amendment. The Government should not now be permitted to repeal that Act insofar as it pertains to reserved rights.[3]

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[3] Interestingly enough, the Government's contention in the instant case is inconsistent even with the position which the Government itself has taken on prior occasions. In *Hurley v. Abbott*, 259 F.Supp. 669 (D. Ariz. 1966), the Government's Motion to Dismiss, signed and orally argued by one of the same counsel who appears for the Government in the instant case, urged five separate grounds for dismissal of the action, not one of which was that § 666 does not apply to reserved rights.

The facts alleged in the complaint in *Hurley v. Abbott*, of which this Court can take judicial notice, are illustrative of the chaos which could result if the Government is allowed to claim unlimited quantities of water under the reservation theory, and then preclude all opportunity for challenge to such claims. The principal sources of water for all of metropolitan Phoenix—presently consisting of more than one million people—are tributaries of the Salt River which flow through an Indian Reservation. If the Government's position in this case is correct, the Bureau of Indian Affairs and the Indian Tribe involved could elect to dot the reservation with industrial activities requiring excessive quantities of water, and could completely cut off the major portion of metropolitan Phoenix's water supply. The people of the Phoenix area would be powerless to do anything about it, except to recite night and morning that the King can do no wrong.

II.

The Government never really declares its position on the second of the two issues in the case: the definition of "a river system or other source." At several points the Government appears to suggest that it must not be joined in suits to determine water rights only along tributaries, and that all claimants to the Colorado River—and we would assume all of its tributaries—must be joined as a prerequisite to obtaining jurisdiction over the United States. At another point the suggestion is made that it would be sufficient if all water users of the Colorado and its tributaries within the State of Colorado were joined. Either of the Government's apparent interpretations would as a practical matter eliminate the possibility of any suit being brought under § 666, simply because the resulting litigation would be totally unmanageable.

In our view, the key to the resolution of the issue lies in interpreting the statutory language against the background of the overall purpose of the statute. The fundamental objective of the statute being to eliminate an otherwise insurmountable obstacle to the adjudication of water rights, the proper interpretation of the statute is that Congress has waived the immunity of the United States in *all* suits involving all claimants to the waters of any river system or other source. Under this interpretation, it is immaterial whether the river involved is or is not a tributary of another river. So long as *all* potential claimants along the river system or other source at issue are joined in the suit, the McCarran Amendment would apply.

The Government complains that it is obligated to defend water suits on other tributaries of the Colorado, and also suits in Utah, Idaho, New Mexico, and Washington. That is because the Government claims water rights on those other tributaries and also in Utah, Idaho, New Mexico, and Washington. But those who use water only along the Eagle River in Colorado are simply not affected by the claims of the users along other Colorado tributaries any more than they are affected by claims of users in Utah,

Idaho, New Mexico and Washington.[4] It would be unfair to users along the Eagle to prevent them from securing adjudication of their water rights without joining the users along all other tributaries of the Colorado, where the claims along these separate tributaries are not in conflict with each other.

In our view, it is highly significant that the statute speaks in the disjunctive: "river system *or* other source. . . ." (Emphasis added.) Thus, the provisions of § 666 were to come into play in suits involving either a "river system" or an "other source." The significance of the statutory reference to both "river system" and also "other source" is illustrated by a situation in Arizona which is typical of the situation in other western states. The Verde River and Tonto Creek are both tributaries of the Salt River, which, in turn, is a tributary of the Gila River, which, in turn, is a tributary of the Colorado River in its lower reaches. The headwaters of Tonto Creek are some 80 miles from the headwaters of the Verde River and these two are separated at all points by two large mountain ranges. The confluence of Tonto Creek and the Salt River is some 50 miles East of the confluence of the Salt and Verde Rivers. Physically it would be impossible for a user on the Verde River to interfere with a user on Tonto Creek. Of course, if an adjudication involved the rights to the use of water from the Salt River below the confluence of the Verde, then the adjudication would be broadened; perhaps such an adjudication is what was anticipated by the words "river system." However, the rights of the appropriators or users on the Verde River obviously could be adjudicated without joining the users on the Tonto.[5]

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[4] Here again, the Government's position is elusive. Is the Government now contending that § 666 applies only to a water suit which would determine all water rights in all states in which the Government has a water claim?

[5] There may be users located downstream from the point of confluence between the Verde and the Salt who assert claims to the waters of the Verde. If so, these users would also have to be joined in a suit to determine rights on the Verde. But users along the Tonto would not be affected.

We submit that where adjudication is sought to determine all rights in a common source of supply of water, it is necessary to join only those who claim rights in that common source of supply. By its extension not only to "river system" but also to "other source" the statute clearly reaches such an adjudication.

The only holding which is consistent with the statutory purpose and with good sense is a holding that if the suit is brought solely for the purpose of determining inter sese rights along a particular river and its tributaries, water claimants along other streams need not be joined, because they are not necessary parties to such a suit. A person who owns land along the Verde River and uses water of the Verde River is simply not affected by the claims of other persons along the Tonto, the Gila, or other tributaries or sub-tributaries of the Colorado, unless by coincidence the same person also happens to own other land on which he uses the waters of those rivers.

The dispositive point is that uses along the Verde and uses along the Tonto are independent, and failure to join Verde users does not prevent an effective inter sese determination of water rights in and to the Tonto. The Verde River, properly viewed, constitutes a "river system;" under any conceivable view it constitutes an "other source." The statute should be interpreted to permit an inter sese determination of the relative rights of claimants, including the United States, in and to that river system or other source. As the Ninth Circuit Court of Appeals stated in *State of Nevada v. United States*, 279 F.2d 699, 701 (9th Cir. 1960):

> "The suit to which the section [666] refers is one to establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves."

The Government's suggestion that statewide adjudication is required is inconsistent with the statute. The relevant statutory language is "river system or other source." There are really two possible interpretations which fit the statutory referent, "river

system or other source." The first is that for which the Government at one point appears to contend here: that a "river system" must include only rivers such as the Colorado, which are not themselves tributaries of some other river, together with all of the tributaries of such rivers. The second is that which we propose, that a "river system or other source" includes any river system, whether itself a tributary or sub-tributary of some other river or not, so long as all claimants to its waters are joined in a single suit.[6] Again, the statement of Senator McCarran is helpful. The sponsor of Section 666 stated that its purpose was "to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of *various owners on a given stream.*" 98 Cong. Rec. 123 (1952) (Emphasis added.) Not "owners on major rivers" nor "all owners within a given State," but "owners on a given stream."

At least in the case of the Colorado River, and we suspect in the case of most others, the interpretation proposed by the Government would render the statute useless, simply because it would be absolutely impossible to join all claimants of the Colorado and all of its tributaries in a single suit. Literally, even with the most modern possible methods, by the time all of the defendants were even identified, a lifetime would have passed, and the identifi-

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[6] Along this line, the Government contends that in order to invoke § 666 in this case all users of the waters of the Eagle—and not just those since the date of the last adjudication—must be joined. The court below has adequately provided for such joinder, if necessary.

cation process would have to be undertaken again.[7] The statute says "*a* river system or other source" which would imply that Congress meant any river system or other source. Especially since the alternate interpretation leads to absurd results, it is respectfully submitted that this is what Congress meant.

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[7] The time, money, and effort required recently to prepare a suit to determine the rights along the Verde River in Arizona will illustrate. The Verde River, as noted above, is only a tributary of a tributary of a tributary of the Colorado. In preparation for a suit under Section 666 to determine all of the rights along the Verde River, an exhaustive title search was conducted to identfy potential water claimants who would have to be joined as defendants. Most of the land acreage served by the Verde River belongs to the United States, so that the search for claimants was greatly simplified. Even under these circumstances, however, the title search took more than three years, and required 12,636 man hours. Corresponding plat work required an additional 15,182 man hours. As a result of this work, 12,953 claimants, in addition to the United States, were identified, at a total cost of $308,053, not including legal fees.

The case was settled before the complaint was ever filed. We need not elaborate, however, on the complexity of a litigation involving 12,953 defendants (with the United States 12,954) each with separate pleading, and separate evidence. Such a suit would have been undertaken had it been necessary, and would have been prosecuted, notwithstanding the tremendous expense and time involved. But the "river system or other source" in that case was only one small river, a tributary of a tributary of a tributary of the Colorado, and most of the land through which the river runs belongs to the United States. The undisputable teaching of the preparation for that lawsuit is that it would be an absolute impossibility to join in a single litigation all of the potential claimants along the Colorado and all of its tributaries, or all potential claimants within the State of Colorado.

CONCLUSION

It is no secret that even before the McCarran Amendment was adopted, the Justice Department opposed it. 98 Cong. Rec. 122-123, (1952). That opposition continues to the present. Either of the contentions which the Government is urging would go a long way toward repeal of 43 U.S.C. § 666.

The entire doctrine of sovereign immunity is of dubious utility. We submit that the total interests of our nation will be better served when the doctrine is completely discarded as a relic of a less enlightened age (as in fact has already been accomplished by a number of states). In the meantime, the decisions of this Court provide precedents for confining sovereign immunity to the precise bounds marked out by Congress. This Court discussed what it characterized as a "chilly feeling against sovereign immunity" in *National City Bank of New York v. Republic of China,* 348 U.S. 356, 359, (1955) as follows:

> [E]ven the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as "Public opinion as to the peculiar rights and preferences due to the sovereign has changed", Davis v. Pringle, 268 U.S. 315, 318, 45 S.Ct. 549, 550, 69 L.Ed. 974; "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past * *," White v. Mechanics' Securities Corp., 269 U.S. 283, 301, 46 S.Ct. 116, 118, 70 L.Ed. 275; "* * * the present climate of opinion * * * has brought governmental immunity from suit into disfavor * * *," Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391, 59 S.Ct. 516, 519, 83 L.Ed. 784.

The basic position taken by the Government in this case flies squarely in the face of contemporary accepted ideas concerning the relationship between government and the people who elect it. The theoretical underpinnings of our entire system are that

power lies ultimately in the people; that government is selected by and responsible to the people; and that the relationships between government and the people are determined by the courts.

The notion that water claims by the United States are immune from legal determination is squarely inconsistent with these cornerstones of our democratic system. The irony of sovereign immunity is aptly illustrated by the position which the Government has taken in this case. The Government is asking this Court to do what Mr. Mastin G. White, on behalf of the Government, unsuccessfully asked Congress to do: prevent any determination concerning the validity of Government claims under the reservation theory.

Whatever the scope of sovereign immunity generally, in water rights litigation involving an entire river system or other source, sovereign immunity has been waived by the Congress of the United States. What Congress has done should not now be undone by this Court.

Respectfully submitted,

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